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IN THE

Supreme Court of the United States

October Term 1968

Number_____

L. M. THOMAS, JR.,

Petitioner,

-vs-

THE STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

L. M. Thomas, Jr. petitions this Court for a writ of certiorari to review the judgment and opinion of the Court of Appeals of Georgia entered in the case of *L. M. Thomas, Jr. v. The State of Georgia* on the 3rd day of September, 1968, in regard to the illegal and unreasonable search and seizure point ruled on by the Court of Appeals of Georgia in the headnote and Section 2 of the body of the decision.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals

of Georgia are as yet unreported but are appended hereto, (Appendix) and unofficially reported in 118 Ga. App. 359, (Advance Sheet of November 7, 1968); 163 S.E.2d 850, (Advance Sheet of November 28, 1968).

JURISDICTION

The judgment of the Court of Appeals of Georgia was dated and entered on September 3, 1968. A rehearing in said judgment was denied by the Court of Appeals of Georgia on September 18, 1968. Petition for Writ of Certiorari to the Court of Appeals of Georgia was filed in the Supreme Court of Georgia in regard to the illegal and unreasonable search and seizure point ruled on by the Court of Appeals in the headnote and section 2 of the body of the Court of Appeals decision, and was denied on November 7, 1968, Motion For Reconsideration being denied on November 21, 1968, (Appendix). The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) since a right, privilege and immunity is specially claimed under the Constitution of the United States of America.

QUESTION PRESENTED FOR REVIEW

The question presented is whether State's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, and 14 (described and listed in Appendix) (R 16-17) and derivative evidence therefrom were obtained through an illegal and unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States of America made mandatory upon the states by the Fourteenth Amendment to the Constitution of the United States of America, Article I, Section I, paragraph XVI of the Constitution of the State of Georgia (1933 Code

of Ga. as amended Sec. 2-116); Vol. I Ga. L. 1966, pp. 567, 568 (Sec. 1); (1933 Code of Ga. as amended Sec. 27-301) and illegally admitted into evidence against petitioner over oral and written objection thereto made in behalf of petitioner during the trial, when petitioner was lawfully arrested for suspicion of murder at a hospital in Atlanta, Georgia where a wounded person died; then while petitioner was in custody of law enforcement officers some twenty miles from his residence, the alleged locale of the alleged homicide for which he was arrested, law enforcement officers, without a search warrant or waiver of search from petitioner, proceeded to petitioner's residence and thoroughly searched said residence, making extensive photographs therein and seizing therefrom any and all evidence which might connect petitioner with said alleged homicide, including alleged means and instrumentalities by which the homicide might have been committed.

CONSTITUTIONAL PROVISIONS AND GEORGIA LAWS INVOLVED

The Fourth Amendment to the Constitution of the United States of America provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

The Fourteenth Amendment to the Contitution of the United States of America provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

The Constitution of the State of Georgia, Article I,

Section I, paragraph XVI (1933 Code of Ga. as amended Sec. 2-116) provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; . . ."

Volume I Ga. L. 1966, pp. 567, 568 (Sec. 1); (1933 Code of Ga. as amended Sec. 27-301) provides:

> "When a lawful arrest is effected a peace officer may reasonably search the person arrested and the area *within such person's immediate presence* for the purpose of:
>
> (a) Protecting the officer from attack; or
>
> (b) Preventing the person from escaping; or
>
> (c) Discovering or seizing the fruits of the crime for which the person has been arrested; or
>
> (d) Discovering or seizing any instruments, articles, or things which are being used, or which may have been used, in the commission of the crime for which the person has been arrested: Provided, however, when the peace officer is in the process of effecting a lawful search, nothing in this section shall be construed as precluding him from discovering or seizing any stolen or embezzled property, any item, substance, object, thing or matter the possession of which is unlawful, or any item, substance, object, thing or matter other than the private papers of any person which is tangible evidence of the commission of a crime against the laws of the State of Georgia."

STATEMENT OF CASE

Petitioner, L. M. THOMAS, JR., was indicted by the Grand Jury of Fulton County, Georgia on August 4,

1967 and charged with the offense of murder, the said offense allegedly having been committed in Fulton County, Georgia on the 30th day of July, 1967. (R 4-6) On January 8, 1968, petitioner entered his plea of not guilty, and the case proceeded to trial before a jury.

The Petitioner, during the direct testimony of Atlanta Police Department Detective C. A. Bailey, put the trial court on notice that motion to suppress state's Exhibits 2, 3, 4, 5, 6, 7, and 8 would be made if it developed that said officer was not authorized to enter petitioner's home and make a search and seizure. (R 100-101) After this notice, the State, through Detective Bailey, developed evidence that when he arrived at petitioner's residence, Officer Anglin was there and the two entered the home, looking the house over to see if anyone else were there, or if anyone else had been hurt. Photographs, State's exhibits 2, 3, 4, 5, 6, 7, 8, were identified by Officer Bailey and offered as evidence in the State's behalf, it also being developed that Detective Bailey initially answered a call to Piedmont Hospital, where he found the petitioner in the custody of Detective Clements. (R 98-106) During the cross-examination of Detective Bailey, it was developed that he had heard a police radio call to Officer Anglin that a person was injured at the petitioner's residence, and the radio later made it known to Officer Anglin that the victim would be at the Piedmont Hospital. Officer Anglin, on Detective Bailey's arrival at the Piedmont Hospital, proceeded to the petitioner's residence. Lieutenant Helms, Mr. Williams of the Identification Bureau, Officer Anglin and Bailey entered petitioner's residence, they knowing that the petitioner was in the custody of Detective Clements at Piedmont Hospital, they having no waiver

of search, or search warrant, the door to the residence being open, and the four officers walking in and conducting a thorough search and seizure of any and all evidence available, extensive photographs being taken therein. (R 106-108)

At this point, oral motion to suppress all evidence which had been identified by Detective Bailey, which included State's Exhibits 1, State's Exhibits 2 through 8, 10, 11, 12, 13, and 14 on the ground that these items were secured in violation of the Fourth Amendment to the Constitution of the United States of America made mandatory on the States by the Fourteenth Amendment to the Constitution of the United States of America and also the Georgia Constitution, inasmuch as the petitioner was in custody, there was ample time and reason to secure a search warrant from proper authorities, and the petitioner did not execute any waiver to search his home, the Court being asked to suppress said evidence, the jury instructed to disregard it, and that it be stricken from the record. (R 109) The petitioner respectfully requested the Court that the case be recessed until such time as petitioner could file a written motion to suppress State's evidence in order to preserve petitioner's constitutional rights against the introduction of illegally seized items. (R 115) The Court overruled the oral motion to suppress evidence and the motion to file written objection at that time. Motion for mistrial was made in behalf of petitioner with the request that the jury be instructed, the Court overruling the motion for mistrial. (R 116) State's exhibits 2 through 8 having been identified, were tendered by the State. Objection to State's exhibits 2 through 8 was orally made in behalf of petitioner on the ground that the evidence as adduced from

Detective Bailey was in flagrant violation of petitioner's constitutional rights, and admission of State's exhibits 2 through 8 was objected to on the ground that it violated petitioner's rights under the Fourth Amendment to the Constitution of the United States of America and also the State's Constitution, said oral objection being overruled by the Court, and State's exhibits 2 through 8 admitted against petitioner. (R 116, 117)

At this point, Detective Bailey testified concerning State's exhibits 1, 2, 3, 4, 5, 6, 7, 8, 10-14, with exception of 13. (R 117-121) At this point, oral objection was made in behalf of petitioner to all the testimony Detective Bailey had given since the previous objection, on the ground that all of said testimony related to and had connection with material seized in an illegal search and seizure, the Court further being requested to exclude said testimony, instruct the jury to disregard it, and to strike it from the record. This oral motion in behalf of petitioner was overruled. Oral motion for mistrial in behalf of petitioner was made and overruled by the Court. (R 121-122)

According to the testimony of Detective E. A. Clements, Homicide Squad, Atlanta Police Department, he first went to the Piedmont Hospital where he stopped and talked with Officer Anglin, allowing petitioner and his son, L. M. Thomas, III, to sit in the police car. He viewed the deceased and observed the wounds to the body, discussing the matter with one Dr. Sommerville, petitioner relating details concerning the death of his wife, petitioner having been advised of his constitutional rights and that he was under arrest. (R 123-128)

In the testimony of Dr. Tom Dillon in behalf of the

State, he testified in connection with an autopsy performed by him, the cause of death of the deceased and concerning State's exhibits 1, 9, and 10. (R 129-133) Oral objection to testimony given by Dr. Dillon was made in behalf of petitioner in connection with State's exhibits 1 and 10 on the ground that this testimony related to evidence which was secured in an illegal search and seizure. The Court was requested to strike the testimony and tell the jury to disregard it. This oral motion was overruled. (R 133) Motion for mistrial was orally made in behalf of petitioner and said motion was overruled by the Court. (R 133-134)

According to the testimony of Detective E. A. Clements, he first went to Piedmont Hospital, Atlanta, Georgia, he approached Officer R. J. Anglin and noticed that petitioner and petitioner's son were standing near the hospital parking lot. This detective talked to Dr. Sommerville, and viewed the deceased. (R 139) After leaving the Piedmont Hospital, Detective Clements took petitioner and petitioner's son to the detective's office on the third floor of the Atlanta Police Department. (R 143) After processing paper work, Detective Clements received from Detective Bailey certain items to be taken to the crime lab in reference to the case. (R 144) Detective Clements testified concerning State's exhibits 1, 9, 10, 11, 12, 14. (R 144-146) At this point, the State tendered State's exhibits 2 through 14 with the exception of State exhibit 13. Oral objection was made in behalf of petitioner to all the testimony that Detective Clements had given relating to State's exhibits 1, 10, 11, 12, and 14 on the ground that these exhibits were the results of an illegal search and seizure in violation of petitioner's constitutional rights, both State and fed-

eral. The State pointed out that exhibits 2 through 8 had already been admitted and that the State was tendering exhibits 9 through 14 with the exception of exhibit 13. At this point, oral objection was made in behalf of petitioner to testimony of Detective Clements relating to State's exhibits 1, 11, 12, and 14 on the ground that they were the result of an illegal search and seizure, said oral motion being overruled by the Court. (R 147) Detective Clements testified that he instructed Officer Anglin to proceed to the residence of petitioner. (R 150)

According to the testimony of Officer R. J. Anglin of the Atlanta Police Department, Northside Unincorporated, at approximately 7:20 p.m. on July 30, 1967, he received a call over the police radio, signal 47, at a Mr. Thomas' residence on Old Roswell Road, and within seconds, the radio came back on the air and advised the victim was at Piedmont emergency. Detective Anglin went to Piedmont Hospital and when he arrived, Detective Clements and Detective Bailey were there. Petitioner and his son were there, and the deceased had already passed away. At that time, Officer Anglin had not gone to petitioner's residence in Roswell, Georgia. (R 154-157) For limited purposes, the Court permitted Detective Anglin to testify to what petitioner's son, L. M. Thomas, III, had stated. Detective Anglin testified that petitioner's son said that his sister in college had been notified and was on her way home, two brothers in South Georgia were on their way home, "he wished I'd go back to the house and prevent them from seeing the room his mother had been in. At that time, I talked to Detective Clements and advised him I was going back on my way to the original call, which was back at the residence of Mr. Thomas, Jr." On arrival at petitioner's

home in Roswell, Georgia, Anglin went to the front door at first, and it was ajar about six to eight inches. Detective Anglin knocked, called, and no one answered, stepped approximately a foot or two in the door since the door was open and repeated was anyone there, receiving no answer. He walked out, and went around to the side door, this door was closed, he didn't enter, just knocked, and didn't get an answer. He went back to his police car in the driveway, waited for the children who were supposed to come and also waited for the detectives and ID to come. (R 158-159) On cross-examination, Officer Anglin admitted that he did not have any type search warrant when he went to petitioner's house, nor did he have a waiver of search from petitioner. (R 159)

At this point, in behalf of petitioner, a written motion to suppress evidence was read in the presence of the Court and jury objecting to State's exhibits 1 through 12 and 14 on the grounds of an illegal and unreasonable search and seizure in violation of both federal and state constitutional rights, alleging that prior to the testimony of Detective C. A. Bailey at the trial, petitioner had no knowledge whatsoever of the alleged illegal search and seizure. The motion further moved that the testimony of Detectives E. A. Clements, C. A. Bailey, Mr. Paul Serene, and Dr. Tom Dillon relating to State's exhibits 1 through 12 and 14 be suppressed, and the said exhibits be suppressed, and the testimony and exhibits not be used in the trial or sent out with the jury. The Court ordered the Clerk to mark the written motion filed, and the Court overruled the motion. (R 254-255) The written motion was marked showing it was filed at 2:25 p.m. on January 9, 1968. (R 7-8)

Direct examination of L. M. Thomas, III, petitioner's son, resulted in denial by him that he told Officer Anglin to go to petitioner's home.

On January 10, 1968, the trial jury returned a verdict finding petitioner guilty of voluntary manslaughter under count one of the indictment, setting his sentence at eight (8) years. (R 9-10) On January 10, 1968, Honorable Oscar L. Long, Judge Emeritus, presiding in Fulton Superior Court, sentenced petitioner to eight (8) years imprisonment. (R 10) An appeal was taken to the Court of Appeals of Georgia, setting out four (4) enumerations of error, the second enumeration of error having to do with the alleged illegal and unreasonable search and seizure of and at petitioner's residence, and admission of evidence therefrom in violation of petitioner's constitutional rights. (R 162) The Court of Appeals of Georgia on September 3, 1968, affirmed the trial court, denying relief under any of the four enumeration of errors, including ground two concerning the illegal and unreasonable search and seizure. Motion for rehearing was denied by the Court of Appeals of Georgia on September 18, 1968. Petition for writ of certiorari to the Court of Appeals of Georgia was filed in the Supreme Court of Georgia in regard to the illegal and unreasonable search and seizure point ruled on by the Court of Appeals of Georgia in the Headnote and Section 2 of the body of the Court of Appeals decision, and was denied on November 7, 1968. Motion for reconsideration was denied on November 21, 1968, both motions being without opinion.

MANNER OF RAISING FEDERAL QUESTION

Petitioner, by oral motions and objections, as well as by written motion to suppress, made during the trial and as outlined in the statement of case heretofore set forth challenged the admission of testimony and evidence alleged to be the fruits of an illegal and unreasonable search and seizure at petitioner's residence without a search warrant, waiver of search, and while he was in custody some twenty miles away.

Enumeration of error 2 filed in the Court of Appeals of Georgia, in connection with the appeal to that court, complained of the admission of State's exhibits and derivative evidence introduced against petitioner which was the result of an illegal and unconstitutional search and seizure at his residence. (R 162) This same point was pressed by petitioner in his motion for rehearing in the Court of Appeals of Georgia. (R 175-179) This point was pressed in the petition for writ of certiorari to the Court of Appeals of Georgia filed in the Supreme Court of Georgia, and in the motion for reconsideration of the petition for writ of certiorari to the Court of Appeals which was filed in the Supreme Court of Georgia.

SUMMARY OF REASONS FOR ALLOWANCE OF WRIT

The decision of the Court of Appeals of Georgia is contrary to the decision of this Court in *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294; 87 S.Ct. 1642, and *James v. State of Louisiana,* 382 U.S. 37; 86 S.Ct. 151.

The decision of the Court of Appeals of Georgia is

contrary to the Constitution of the State of Georgia, Article I, Section I, Paragraph XVI, (1933 Code of Ga. as amended Sec. 2-116) concerning unreasonable search and seizures as well as Volume I, Ga.L. 1966, pp. 567, 568 (Sec. 1); (1933 Code of Ga. as amended Sec. 27-301) inasmuch as said code section provides that under certain circumstances not present in this case, a reasonable search of the person arrested and the area *within such person's immediate presence* may be searched.

The question involved is of gravity and importance in the administration of the criminal laws in all State and federal trials in regard to the right of a defendant against an illegal and unreasonable search and seizure in violation of his constitutional rights, and the introduction of the fruits of such searches and seizures during his trial.

ARGUMENT OF REASONS FOR ALLOWANCE OF WRIT

A search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. See Ga. Code Ann. Sec. 27-301; *Stoner v. State of California,* 376 U.S. 483, 486, 84 S.Ct. 889, 891, 11 L.Ed 2d 856; *Preston v. United States,* 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed 2d 777. Under the doctrine of *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed 2d 1081, and *Ker v. State of California,* 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed 2d 726, it was constitutional error to admit the fruits of an illegal search into evidence at the trial. In *James v. State of Louisiana,* 382 U.S. 37, 86 S.Ct. 151 it was held that the search of an accused's home was not an incident to his arrest on a street corner more than two blocks away,

and it was constitutional error to admit the fruits of this illegal search into evidence at the State Court trial. It is conceded that in *Schmerber v. State of California,* 384 U.S. 853, 86 S.Ct. 1826 that an exception was made concerning the approval of taking the blood sample in a drunk driving case without a search warrant on the theory that the percentage of alcohol in the blood of the accused would diminish on any delay and thus evidence might be destroyed. Searches conducted without warrants have been held unlawful not withstanding facts unquestionably showing probable cause. *Agnello v. United States,* 269 U.S. 20, 33, 46 S.Ct. 4, 6, 70 L.Ed 145, for the Constitution requires that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police. *Wong Sun v. United States,* 371 U.S. 471, 481-482, 83 S.Ct. 407, 414, 9 L.Ed 2d 441. Over and again, the Supreme Court of the United States has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes; *United States v. Jeffers,* 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed 59, and that searches conducted outside the judicial process without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, see *Jones v. United States,* 357 U.S. 493, 497-499, 78 S.Ct. 1253, 1256-1257, 2 L.Ed 2d 1514; *Rios v. United States,* 364 U.S. 253, 261, 80 S.Ct. 1431, 1436, 4 L.Ed 2d 1688; *Chapman v. United States,* 365 U.S. 610, 613-615, 81 S.Ct. 776, 778, 779, 5 L.Ed 2d 828; *Stoner v. State of California,* supra, subject only to a few specifically established and well-delineated exceptions set forth in *Carroll v. United States,* 267 U.S. 132, 153, 156, 45 S.Ct. 280, 285, 286, 69 L.Ed 543; *McDonald v. United States,* 335 U.S. 451, 454-456, 69 S.Ct. 191, 192-

194, 93 L.Ed 153; *Brinegar v. United States,* 338 U.S. 160, 174-177, 69 S.Ct. 1302, 1310-1312, 93 L.Ed 1879; *Cooper v. State of California,* 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed 2d 730; *Warden, Md. Penitentiary v. Hayden,* 387 U.S. 294, 298-300, 87 S.Ct. 1642, 1645-1647, 18 L.Ed 2d 782, these contemporaneous searches being justified by the hot-pursuit theory of the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime, things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. These justifications and exceptions are absent where a search is remote in time or place from the arrest, for once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest. It is respectfully submitted and strongly urged that there were no exigencies under the facts in this case requiring the search of petitioner's residence without a search warrant, and there is no justification for a search under the exceptions now permitted by the law. Even under the theory of *Abrams v. State,* 223 Ga. 216, hn 2, the accused was arrested, and the area within that accused's immediate presence was searched.

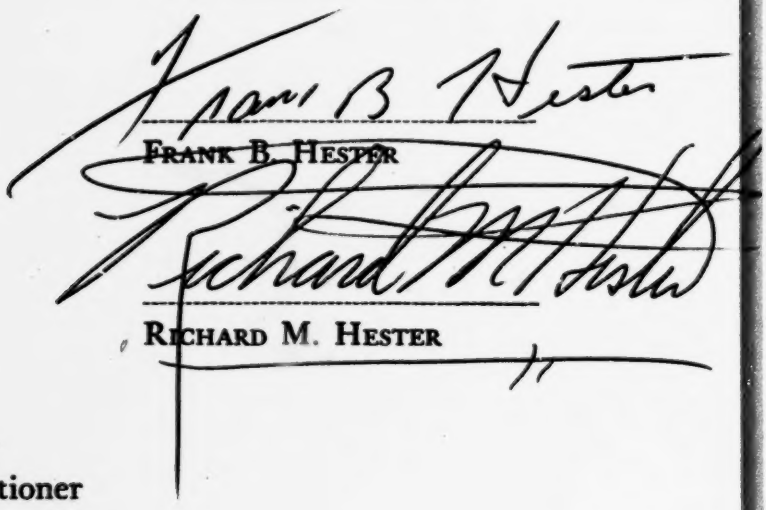
In the case of *Bumper v. State of North Carolina,* 391 U.S. 543; 88 S.Ct. 1788; 20 L.Ed 2d 797, it was held that a grandmother who was told that a search warrant existed erroneously could not consent to a search of her home that resulted in the seizure of a rifle used against defendant who lived with his grandmother. In the case of *Amos v. U. S.,* 255 U.S. 313, officers went to defendant's home, he was not at home, wife consented for them to search the house, search held unlawful. The

Amos case, supra, cites *Boyd v. U. S.,* 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed 746; *Weeks v. U. S.,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed 652; *Silver Lumber Co. v. U. S.,* 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed 319. See *Chapman v. U. S.,* 365 U.S. 618, 81 S.Ct. 776, 5 L.Ed 2d 828. It is respectfully submitted that petitioner's son, L. M. Thomas, III, could not waive petitioner's constitutional right against unreasonable search and seizure, and that the authority set out hereinbefore supports petitioner's contention that a verdict of guilty through use of evidence obtained in violation of the provisions of the Fourth Amendment to the Constitution of the United States renders the verdict and the judgment of conviction thereon invalid. *Gouled v. U. S.,* 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed 647; *Harris v. U. S.,* 331 U.S. 145, 67 S.Ct. 1098.) In connection with the search and seizure arguments, in *Johnson v. U. S.,* 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed 436, the Court said: "The officers, in making a search without a warrant would reduce the Fourth Amendment to a nullity and leave the people's property secure only in the discretion of the police officers." It should be noted that the United States Supreme Court held that, "a valuable right is never presumed to be waived." (*Johnson v. Zerbst,* 304 U.S. 458 (1937)).

CONCLUSION

It is respectfully submitted that the decision and judgment of the Court of Appeals of Georgia in not affording relief to petitioner concerning the illegal and unreasonable search and seizure and the admission into evidence against him the fruits thereof is contrary to law, and the judgment of the Court of Appeals of Georgia should be vacated, the petitioner granted a new trial, and the case remanded to that court for further proceedings in compliance therewith.

Respectfully submitted,



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APPENDIX

In the Court of Appeals of Georgia (118 Ga. App. 359); (163 S.E.2d 850).

43816. *L. M. THOMAS, JR. vs. THE STATE*

When a person was lawfully arrested for suspicion of murder at a hospital where a wounded person died, a search without a warrant at the scene of the suspected crime, the residence of the suspect, specifically directed to the means and instrumentalities by which the crime was committed, was one which the situation reasonable demanded and was not unlawful.

The defendant appeals from his conviction for voluntary manslaughter for which he received a sentence of 8 years.

HALL, Judge. 1. The defendant enumerates as error the overruling and denying of his challenge to qualifications of panels, challenge to polls and array and his objections to excusing of jurors opposed to capital punishment. On June 3, 1968, the Supreme Court of the United States held that a death sentence cannot constitutionally be executed if imposed by a jury which by law is given broad discretion to choose between life imprisonment and capital punishment, when all persons on the panel who are opposed to capital punishment or have conscientious scruples against imposing the death penalty have been removed as disqualified for that reason alone. *Witherspoon v. Illinois,* 391 U.S. 510. (88 S.C. 1770, 20 L.Ed 2d 776) (Decided June 3, 1968.) However, on the same date the court held

in another opinion that this principle has no application in a case where the jury did not impose the death penalty. *Bumper v. North Carolina,* 391 U.S. 543. (88 S.C. 1788, 20 L.Ed 2d 797) (Decided June 3, 1968). The trial court did not err in the above rulings.

2. The defendant enumerates as error the overruling of his motion to suppress evidence made in writing after the State had rested its case. The ground of the motion was that the defendant's residence had been illegally searched by the police without a warrant, evidence seized and photographs made of the premises in violation of the defendant's constitutional rights, and that prior to the testimony of a detective the defendant had no knowledge whatever of the illegality of the search and seizure.

The Georgia Search and Seizure Law of 1966 does not expressly provide the time when the motion must be made. However, this court has held that the motion must be timely made or else it is waived. *Gilmore v. State,* 117 Ga. App. 67 (159 S.E.2d 476); *Watts v. State,* 117 Ga. App. 558 (161 S.E.2d 516). The State contends that it must always be made prior to trial. We disagree.

The Georgia law, while not identical, is similar to Rule 41 (e) of the Federal Rules of Criminal Procedure. That Rule expressly provides that the motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion. "At least, the motion must be made before the testimony is begun if defendant knows of the unlawful

seizure and has had an opportunity to present the question in advance of trial." 11 Cyclopedia of Federal Procedure, 3rd ed. 591, Sec. 44.49. The Rule is merely a restatement of previous federal decisions. *Agnello v. United States,* 269 U.S. 20, 46 Sup. Ct. 4, 70 L.Ed. 145, 51, 51 A.L.R. 409. Its purpose is to avoid the interruption of the trial for the purpose of investigating the collateral issue of the legality of the means by which the evidence was obtained. 50 A.L.R. 2d 483. However, it is not "a narrow, finicky procedural requirement" in that "the court in its discretion may entertain the motion at the trial or hearing." *Jones v. United States,* 362 U.S. 257, 264, 80 Sup. Ct. 725, 4 L.Ed 2d 697, 79 A.L.R. 2d 233.

In our opinion the above principles are applicable to the Georgia statute.

Whether or not the defendant's motion was timely, however, the evidence was not subject to suppression. It appears from the record that after the deceased was wounded the defendant and his son drove her to the office of a physician and then to the hospital. When the deceased died shortly after arrival at the hospital the attending physician directed a hospital employee to call the police "Because it looked like it should be a coroner's case." The officer patroling in the area of the deceased's residence received a police radio call signaling that a person was injured at the residence. This was followed by a radio call that the victim was at Piedmont Hospital. A police detective received a radio call to go to the hospital. The patrol officer and detectives went to the hospital. One of the detectives

arrested the defendant and told him he was suspected of murder. The patrol officer then went to the residence, found the door open, went in the house and found no one there, and went back to his car ad waited for the detectives and for children of the deceased whom he stated he had been told were on their way. This officer stated that the deceased's son had requested at the hospital that he go back to the house and prevent his brothers and sisters seeing the room his mother had been in; the son denied this. Three other officers went from the hospital to the house, entered, took photographs, and took things from the house that the State used as evidence at the trial. The officer directing the investigation at the house testified that when he left the hospital the defendant was in the custody of the arresting officer, and that his authority for entering the house was that he had heard the call on the police radio to the patrol officer signaling a person was injured there, and the following call that the victim was at the hospital; that at the hospital he met the patrol officer, who left the hospital stating he was going to the residence, that he didn't know whether there was someone else injured, or who had called or whether the call had been placed from the home.

The issue is whether in these circumstances the search without a warrant at the scene of the suspected crime, the residence of the person under arrest for suspicion of murder, was reasonable. It is not questioned that the defendant was lawfully arrested. We recognize that the defendant's right of privacy is protected against unreasonable in-

vasion by the Fourth Amendment. *Warden v. Hayden,* 387 U.S. 294, 305, 307, 87 Sup. Ct. 1642, 18 L.Ed 2d 782. This is not a case like *McDonald v. United States,* 335 U.S. 451, 69 Sup. Ct. 19, 93 L.Ed 153, however, in which the officers had had the defendant "under surveillance for two months" at his house and no reason for failure to seek a search warrant appeared. Moreover, the fact of an interval of time between the arrest and the search does not render the search invalid. The relevant factor is the extent to which effective law enforcement would be frustrated by requiring the police to obtain a search warrant. The practicability of procuring a search warrant is not "a *sine qua non* to the reasonableness of a search . . . Some flexibility will be accorded law officers . . . Upon acceptance of (the) established rule that some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant . . . Whether the search was reasonable . . . depends upon the facts and circumstances — the total atmosphere of the case. It is a sufficient precaution that law officers must justify their conduct before courts which have always been, and must be, jealous of the individual's right of privacy within the broad sweep of the Fourth Amendment." *United States v. Rabinowitz,* 330 U.S. 56, 65, 70 Sup. Ct. 430, 94 L.Ed 653; *Cooper v. California,* 386 U.S. 58, 62, 70 Sup. Ct. 430, 94 L.Ed 653. It cannot be said that in the facts and circumstances of this case the place that could reasonably be sub-

jected to search was "to be determined by the fortuitous circumstance that the arrest took place" at a different place than the search or by the fact that the place searched was the defendant's dwelling place. There is no indication that the search "went beyond that which the situation reasonably demanded," but it appears to have been "specifically directed to the means and instrumentalities by which the crimes charged had been committed." *Harris v. United States,* 331 U.S. 145, 150, 152, 153, 67 Sup. Ct. 1098, 91 L.Ed 1399. *Abrams v. State,* 223 Ga. 216 (154 S.E.2d 443).

The trial court did not err in overruling the defendant's motion to suppress.

3. There was evidence that a bent vacuum cleaner handle, which had traces of blood on it, was found in the room where the defendant and his deceased wife were shortly before her death. There was medical testimony that this instrument could have caused the deceased's fatal wound. The defendant denied hitting her with this instrument. He testified that his wife had threatened to kill him previously and on the afternoon of her death they got into a discussion and she threatened to kill him, and as she walked away from him toward a chest he threw a glass jar to excite her but did not intend to hit her; the jar did hit and cut the deceased's head.

The evidence authorized the court to charge on voluntary manslaughter. *Crawford v. State,* 12 Ga. 142 (6) (....S.E.....) *Wall v. State,* 126 Ga. 449, 551 (55 S.E. 405); *French v. State,* 42 Ga. App. 97, 98

(155 S.E. 47); *Turner v. State,* 111 Ga. App. 860 (143 S.E.2d 485); *Hamilton v. State,* 114 Ga. App. 50 (149 S.E.2d 922).

4. The defendant contends that he was entitled to a mistrial because of the Solicitor's cross-examination of the defendant's witness as to the witness' knowledge of a 1963 conviction of the defendant for a law violation. The witness had testified that the reputation of the defendant was good and he would believe him under oath. The court overruled the defendant's motion for mistrial and instructed the jury to disregard the questioning. Irrespective of the propriety or admissibility of the evidence which the Solicitor sought to present, the court did not permit him to present it and instructed the jury accordingly. The court did not err in overruling the motion for mistrial. *Spurlin v. State,* 222 Ga. 179, 181 (149 S.E.2d 315).

Judgment affirmed. Bell, P.J. and Quillian J. concur.

24935 *SUPREME COURT OF GEORGIA*

Atlanta, November 7, 1968

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

L. M. THOMAS, JR. v. THE STATE.

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

24935 *SUPREME COURT OF GEORGIA*

Atlanta, November 21, 1968

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

L. M. THOMAS, JR. v. THE STATE

Upon consideration of the motion for a reconsideration filed in this case, it is ordered that it be hereby denied.

DOCUMENTARY EVIDENCE
FOR THE STATE

S-1 Head portion of vacuum cleaner with 2 bents, found in the Thomas' bedroom with traces of blood, located between night table and bed.

S-2 Photograph taken by Mr. Williams of I.D. Bureau depicting floor, edge of commode, bathtub, bathroom off of Thomas' bedroom, and bloody footprints and towels in cardboard box.

S-3 Photograph of Thomas' bedroom taken by Mr. Williams of I.D. Bureau depicting vacuum cleaner head between night stand and bed, bloody pillow, sheets, towels, bathrobe, gauze, lady's slip and pair of panties at the foot and on the side of the bed.

S-4 Photograph of Thomas' bedroom taken by Mr. Williams of I.D. Bureau, taken from the foot of the bed in the Thomas' bedroom showing glass all over the floor, bloody towels at entrance of bathroom, box containing bloody towels, blood by dresser, and some attempt to wipe up

blood on floor, also large piece of flesh, hair and scalp on floor.

S-5 Photograph of Thomas' bedroom, taken by Mr. Williams of I.D. Bureau, depicting closer view of dresser, bloody towels at edge of bathroom door, small pieces of glass and broken bottle, neck of broken bottle with hair and small pieces of flesh on it, also vacuum cleaner between night stand and bed.

S-6 Photograph of Thomas' bedroom, taken by Mr. Williams of I.D. Bureau, depicting closeup of broken bottle neck intact with small pieces of flesh and hair located by dresser.

S-7 Photograph of Thomas' bedroom, taken by Mr. Williams of I.D. Bureau, depicting bed, lady's slip, panties, night coat, several bloody towels, piece of gauze at foot of bed on left side.

S-8 Photograph of Thomas' bedroom, taken by Mr. Williams of I.D. Bureau, depicting large piece of hair and scalp, lady's housecoat stained with blood.

S-9 Photograph of Sarah Thomas, deceased, showing wound to left side of head as of July 30, 1967, taken by Mr. Williams of I.D. Bureau.

S-10 Broken intact neck of a quart fruit jar found in bedroom of the Thomas' home with traces of blood and hair attached.

S-11 Towels and gauze stained with human blood, type A, found in Thomas' bedroom and bathroom.

S-12 Pillow, sheets, towel and one slip, housecoat and pair of woman's panties stained with human blood, type A, found in Thomas' bedroom.

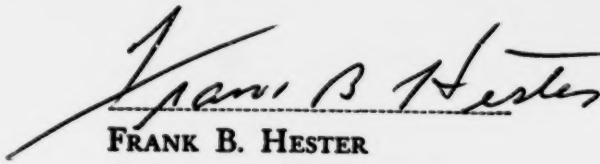
S-13 Lock of hair taken from deceased, Sarah Thomas.

S-14 Glass and hair stuck to it and also flesh found on floor of Thomas' bedroom.

CERTIFICATE OF SERVICE

I do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and have this day delivered three (3) copies of this Petition for Writ of Certiorari to the Court of Appeals of Georgia by personally handing same to Honorable Lewis R. Slaton, District Attorney, Atlanta Judicial Circuit, Fulton County Courthouse, Atlanta, Georgia 30303.

This 4th day of February, 1969.



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525-7616

IN THE

Supreme Court of the United States

October Term 1968

No. 1016

L. M. THOMAS, JR.,

Petitioner,

vs.

THE STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
COURT OF APPEALS OF GEORGIA

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term 1968

No. 1016

L. M. THOMAS, JR.,

Petitioner,

vs

THE STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion and judgment of the Court of Appeals of Georgia and the denial of certiorari by the Supreme Court of Georgia without opinion, as yet unreported officially, is appended to the petition.

JURISDICTION

The jurisdiction of this court is conceded.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The citations by the Petitioner appears to cover the Constitutional Provisions and statutes involved in this case with the exception of the following Georgia Statutes:

(a) Georgia Code Annotated §27-304 (1933), which provided as of the dates involved in this case as follows:

> "All warrants shall state the time and date of issuance and be the warrants of the judicial officer issuing the same and not the warrants of the court in which he is then sitting and such warrants need not bear the seal of the court or clerk thereof. The complaint on which the warrant is issued need not be filed with the clerk of the court nor with the court if there is no clerk until the warrant has been executed or has been returned 'not executed': Provided, however, said judicial officer *shall keep a docket record* of all warrants issued by him and *upon issuing any warrant he shall immediately record same, within a reasonable time,* on said docket. (Acts 1966, pp. 567, 569)"

(b) Georgia Code Annotated §27-310 (1933), which provided as of the dates involved in this case as follows:

> "A written return of all instruments, articles or things seized shall be made without unnecessary delay before the judicial officer named in the warrant or before any court of competent jurisdiction. An inventory of any instruments, articles or things seized shall be filed with the return and signed under oath by the officer or person executing the warrant. The judicial officer or court shall upon

request deliver a copy of the inventory to the persons from whom or from whose premises the instruments, articles or things were taken and to the applicant for the warrant. (Acts 1966, pp. 567, 570)"

(c) Georgia Code Annotated §27-313 (1933), which provided as of the dates involved in this case as follows:

"(a) A defendant aggrieved by an unlawful search and seizure may move the court for the return of property the possession of which is not otherwise unlawful and to suppress as evidence anything so obtain on the grounds that:

(1) The search and seizure without a warrant was illegal; or

(2) The search and seizure with a warrant was illegal because the warrant is insufficient on its face; there was not probable cause for the issuance of the warrant; or, the warrant was illegally executed.

(b) The motion *shall be in writing* and state facts showing wherein the search and seizure were unlawful. The judge shall receive evidence out of the presence of the jury on any issue of fact necessary to determine the motion, and the burden of proving that the search and seizure were lawful shall be on the State. If the motion is granted the property shall be restored, unless otherwise subject to lawful detention, and it shall not be admissible in evidence against the movant in any trial.

(c) The motion shall be made only before a court with jurisdiction to try the offense. If a criminal accusation is filed, or if an indictment or special presentment is returned by a grand jury, the motion shall be made only before the court in which said accusation, indictment or special presentment is filed and pending. (Acts 1966, pp. 567, 571)"

QUESTIONS PRESENTED FOR REVIEW

Counsel for the State of Georgia, Respondent, cannot agree with Petitioner's brief (page 2) because as worded, the question ignores the actual decision on the issues by the State Court.

Being dissatisfied with the question as phrased by the Petitioner, we would restate it as follows pursuant to Rule 40 (3) of this Court:

1. Whether the Court below erred in ruling that it was within the Fulton County Trial Court's discretion to overrule a written Motion to Suppress Evidence that was not filed until all the State's witnesses had testified and after the State had rested its case.

2. Whether the Court below erred in ruling that the search of the petitioner's residence, where the petitioner had killed his wife, without a search warrant was reasonable under the exigencies of the emergency situation in the present case where the uncontradicted facts show:

> **The officers received an emergency call to the petitioner's residence stating that a person had been injured. A few minutes later, the officers received another call stating that the victim was being taken to Piedmont Hospital. However, the victim was dead when the officers arrived at the hospital.**
>
> **The officers proceeded directly from the hospital to answer the original call not knowing who had placed the original call to police or whether the call had been placed from the residence and not knowing whether someone else**

was injured or dead at the residence. The officers had been told by the son that an unknown number of persons had been called and were on their way to the residence. Moreover, the officers had been told by the petitioner and his son that the petitioner had hit the victim in the back of the head with a fruit jar during a violent argument and that the bedroom of the residence was covered with blood. The son asked the officers not to allow his brothers and sisters to see the bloody bedroom where his mother had been killed. The front door of the residence was open when officers arrived and no one responded to Officer Anglin's calls.

STATEMENT OF THE CASE

Counsel for the Petitioner has stated the facts and the chronology of the proceedings in this case in a manner that fails to reflect the true status of the issues currently before this court. His Statement of the Case ignored the true context of the Georgia Court of Appeal's decision by omitting material portions of the evidence relevant to the State Court's ruling which presents a distorted picture of the evidence and issues.

To comprehend the true issues in this petition for certiorari we feel it would benefit this court to have a more detailed summary of the evidence upon which the Georgia Court of Appeals rendered its decision.

A. CHRONOLOGY

The petitioner, L. M. Thomas, Jr., was arrested at Piedmont Hospital, Atlanta, Georgia on July 30, 1967 for suspicion of murder *in the death of his wife.* He

was indicted by the Grand Jury of Fulton County, Georgia on August 4, 1967 and charged with the offense of murder, the said offense having allegedly been committed at the family residence located in Fulton County, Georgia. *Some five months later* on January 8, 1968, L. M. Thomas, Jr. entered his plea of not guilty by joining issue, and the case proceeded to trial before a jury. (R 4-6) [1]

B. CHRONOLOGY OF THE TRIAL

The State presented its case to the jury in the following sequence of testimony, colloquy, and objections:

(a) This homicide took place on Sunday afternoon around 5:00 o'clock in Petitioner's home (R 20). There were no eyewitnesses. Petitioner's 19-year old son, L. M. Thomas, III, the State's first witness, a college student, was in the living room playing pool with a friend. His mother and father were in the bedroom. He heard his mother and father talking "fairly loud". (R 22-23). They were "almost shouting at each other" (R 23). About 5 seconds later, his mother called, "Sonny, come here", (R 23) his friend decided to leave, and the son entered his bedroom. He was shocked by what he saw. His mother (the victim) was in the adjoining bathroom, while his father (the Petitioner) was in the other bedroom "cursing" (R 22). His mother was holding a towel to her head, with blood saturating through (R 23). She told her son that she had been hit by a jar thrown at her by the Petitioner. The Petitioner said nothing (R 24). She was holding the towel to the back of her head (R 23). The son saw a broken glass jar in the bedroom and

[1]The pages listed are the approximate pages of the record. A copy of the record sent to this court was not made.

also a bent portion of a vacuum cleaner, Exhibit #1 (R 31-32). The son testified that his mother appeared intoxicated when he first saw her in the bedroom (R 44). Both Petitioner and his wife had been drinking alcoholic beverages that afternoon, prior to 5:00 o'clock according to the son (R 28). He saw blood on the floor of the bedroom (R 33). He identified States Exhibit No. 1 as looking like the vacuum cleaner handle in his father's and mother's bedroom (R 32).

(b) Dr. Margaret Summerville, the State's second witness, received a call from the answering service and reached Petitioner at 5:35 o'clock by phone at his home and asked him the nature of his wife's injury. He was "belligerent and hostile", (R 57) and would not give the doctor any information. "All he would say was she just had an accident, come and treat her" (R 57). She asked Appellant to describe the wound and he said "he could not stand the sight of blood" (R 58). The doctor told Petitioner to bring his wife to the office and she would meet him there in 20 minutes. She arrived at the office at 6:00 o'clock but Petitioner and the victim did not arrive until 6:30 (R 58). Mrs. Thomas was lying in the back seat, ashen colored and with a towel around the back of her head, which had a good deal of matted and dried blood. Petitioner said *"she can get up and walk if she wants to"* (R 59). However, she had to be carried into the office. Upon examination, the doctor saw a large hemotoma (behind the left ear) and a four inch cut from which tissue and blood was oozing. The victim's blood pressure was non-existent, heart tones very faint and irregular, pupils dilated, and no knee reflexes at all (R 60). She had a marked alcoholic odor to her breath and was able to speak but was "extremely

slurred and incoherent" (R 60). Bruises were visible upon her legs, pelvic area, and arms (R 82).

Mrs. Thomas said to Petitioner, in the doctor's presence, "I told you to leave me alone" (R 61).

The doctor gave the victim adrenalin, but there was no response in blood pressure whatever. Dr. Summerville then called a neuro-surgeon, called Piedmont Hospital and had Petitioner and his son drive the victim to the hospital. She followed in her car. They arrived at the hospital at 7:00 o'clock, gave Mrs. Thomas artificial respiration and extracardiac massage but in vain. She was pronounced dead at 7:25 p.m. The cause of death was head injury and shock (R 63-65).

Dr. Summerville gave her expert opinion that the broken glass jar (State's Exhibit 10), if thrown while empty at a person would probably not have caused a laceration and fracture of the magnitude of the wound behind the left ear of the victim (R 71). However, she stated that State's Exhibit One (the bent vacuum cleaner handle found in the bedroom) could possibly have caused such a wound (R 71-72).

(c) Paul Serene, a criminologist and microanalyst with the State Crime Laboratory, was the State's third witness. A considerable amount of expert testimony was introduced by the State which may be very briefly summarized. The bent vacuum cleaner handle, Exhibit #1, seized in the bedroom had traces of blood on the end (R 85). The top of the broken glass jar, (State's Exhibit #10) found in the bedroom had traces of blood and also some hair attached to it (R 85). Blood on towels, pillow, sheet and female clothing (State's Exhibits #11 and 12) found in the bedroom was Type A,

which is the same type as the blood sample taken from the deceased Mrs. Thomas (R 85-87). A hair taken from the head of Mrs. Thomas (State's Exhibit #13) was compared with hair from the broken glass jar (State's Exhibits #10 and 14) and "were identical in all respects" (R 87-89).

The defense thoroughly cross-examined this witness upon his findings (R 90-95).

(d) Detective C. A. Bailey, the State's fourth witness, went to the hospital to assist Detective Clements and left the hospital directly for the Thomas residence, where Mrs. Thomas had been killed a short time before, with Lt. Helms and Mr. Williams of the Identification Bureau. He identified State's exhibits #2, 3, 4, 5, 6, 7, 8 as photographs taken of the bloody bedroom and taken under his supervision and control. These exhibits were tendered into evidence (R 98-100).

At this time, defense counsel engaged in colloquy with the court requesting the opportunity to develop on cross-examination the police's authority to enter the home and take pictures (R 100-101). This was the first time any issue had been made to the legality of the search and was not in the form of a formal objection.

The direct examination of Detective Bailey continued without objection. He related the scene he discovered as follows:

> "In a bedroom in the home we found blood all over the floor of the bedroom, the bed in the bedroom that had blood on the sheets and pillow. Found a broken jar amidst all the blood and scattered clothing on the floor, numerous towels that were completely soaked with blood. Found bloody

> footprints leading from the bedroom into another bathroom and to another bedroom to a small hallway. In the bathroom, found some more bloody towels in a cardboard box, and also in the driveway found another bloody towel next to a Cadillac automobile. Found hair and a piece of flesh on the floor and found intact the neck of a broken bottle that had hair and small pieces of flesh on it also." (R 102)

Bailey identified State's exhibits No. 1, 10, 11, 12, and 14 and related where each exhibit was found in the bedroom without objection (R 102-106). Then he was cross-examined by the defense (R 106-109).

(e) After the direct and cross-examination of the State's fourth witness was completed, the defense made its initial oral motion to suppress State's exhibits No. 1, 2-8, 10, 11, 12, 13 and 14 upon the ground that these items were secured without a search warrant in violation of the defendant's rights under the Fourth Amendment as applicable to the States under the Fourteenth Amendment. However, *the objection or motion did not extend to striking the testimony of the various witnesses upon the exhibits* (R 109).

The defense failed to make any showing that the defense did not have an opportunity to file a motion to suppress evidence earlier. The defense *did not attempt to make any showing that the defense was not barred by laches* from filing a motion to suppress at this time. Moreover, the State pointed out that *the Defense had not been misled* and had not approached the State upon the matter of the search, which was not refuted (R 115).

The trial court overruled the oral motion to suppress the evidence and the subsequent motion to adjourn

until the defense could prepare and file a written motion to suppress (R 116). State's exhibits No. 2 through 8 were admitted into evidence over objection during subsequent testimony by the witness (R 117).

(f) The jury was sent to lunch while a brief five minute recess was taken for the benefit of the defendant (R 123).

After a brief *Jackson v. Denno* hearing, the court adjourned for the noon recess (R 128-129).

(g) Dr. Tom Dillon, the County Medical Examiner and the first witness after lunch, stated that the fatal wound was inflicted, in his opinion, by a blunt instrument, and that the broken glass jar *could not* have inflicted the fatal wound, but that the bent vacuum handle *could* have inflicted such wound (R 132).

(h) Atlanta Homicide Detective, E. A. Clements, went to the hospital on the night of the slaying, viewed the body of Mrs. Sara Thomas, discussed the case with Dr. Summerville, talked with Petitioner's son, and then to Petitioner, after advising him completely of his constitutional rights. Petitioner freely and voluntarily told the officers that "he and his wife were in the bedroom of their home, that he and his wife had had an argument about lying on the bed, that Mrs. Thomas began to curse him. She got up from the bed cursing him, that she went *toward the bathroom* at which time he *picked up a fruit jar sitting beside the bed, threw it at Mrs. Thomas,* striking her (R 125-126). He said "it hit her in the head" (R 127).

(i) R. J. Anglin, in whose police beat the Thomas home was located, received a police call to the Thomas'

residence on Old Roswell Road. Seconds later he received a call that the victim was at Piedmont Hospital. He proceeded to Piedmont Hospital where he found that the vicitm had died (R 154-156). He talked with L. M. Thomas, III (the son) who said he had a sister in college who had been notified and was on the way home. Also two brothers in South Georgia were on the way home. Officer Anglin testified the son said, "He wished I'd go back to the house and prevent them from seeing the room his mother had been in" (R 158).

Officer Anglin *proceeded to answer his original call* to the Thomas' home. Detective Bailey testified that Officer Anglin told him he was proceeding to the Thomas' residence because he didn't know whether someone else was injured at the home, who had called, or whether the call had been placed from the house (R 107).

Upon arrival, Officer Anglin found the front door open, knocked loudly, stepped inside, called out, and tried another door and found it locked. He then waited for the detectives and ID immediately behind him and the petitioner's children (R 158, 159).

(j) After the State rested its case, the defense filed a written motion to suppress the testimony of Detective E. A. Clements, C. A. Bailey, Paul Serene, and Dr. Tom Dillon relating to State's exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, and 14 and to suppress the exhibits enumerated for the first time. This written motion was filed at 2:25 P.M. in the afternoon of the second day of trial (R 160, 161).

REASONS FOR NOT GRANTING CERTIORARI

A. THE MOTION TO SUPPRESS EVIDENCE, THAT WAS NOT RAISED BY ORAL MOTION UNTIL AFTER FOUR STATE'S WITNESSES HAD ELABORATED UPON THE EVIDENCE AND WAS NOT FILED IN WRITTEN FORM UNTIL THE STATE RESTED, WAS PROPERLY DENIED IN THE PRESENT CASE WHERE NO SHOWING WAS MADE THAT THE DEFENSE DID NOT HAVE AN OPPORTUNITY TO KNOW WHETHER A SEARCH WARRANT HAD BEEN ISSUED PRIOR TO TRIAL.

The State Trial Court had the discretion to allow or not allow a Motion to Suppress Evidence during the trial or hearing.

The Georgia Court of Appeals' opinion in the present case set forth in the Appendix of Petitioner's Brief holds that the Trial Court has the discretion to allow a Motion To Suppress Evidence during the trial or hearing. In so holding, the Court of Appeals equates the language of the Georgia Search and Seizure Law of 1966 and Rule 41 (e) of the Federal Rule of Criminal Procedure. Moreover, the Court reaffirms the rule that the motion must be timely filed or it is waived citing *Brannen v. State,* 117 Ga. App. 69 S.E. 2d; *Gilmore v. State,* 117 Ga. App. 67, S.E. 2nd. This opinion, in effect, upholds the Trial Courts determination that the motion was not timely filed and the Trial Courts refusal to entertain the written Motion to Suppress.

In *Brannen v. State,* supra, the Georgia Court said, in part:

> "Since the Act of 1966, an oral objection to evidence obtained by unlawful search and seizure is not sufficient unless preceded by suppression of the evidence pursuant to a motion to suppress in compliance with the Act. The Act clearly evinces the legislative intent that suppression, or exclusion, of the evidence must be founded on motion, or objection, in writing." (Emphasis added)

As we have pointed out in the State's Statement, no written motion to suppress evidence was made prior to trial. Considerable testimony was given without objection as to objects taken from the scene of the slaying to the blood-stained condition of the bedroom. (See R-32 where the son identified the bent vacuum cleaner handle and R 52-53 where defense counsel cross-examined the son about the vacuum cleaner handle.) See also the testimony of Paul Serene, the expert witness from the State Crime Laboratory, who testified at length about all the State Exhibits taken from the bedroom, without a single objection by the defense. (R 83-90) and defense counsel's cross-examination of him about these same Exhibits (R 90-93).

All of the photographs were identified as accurately portraying the scenes depicted by Detective C. A. Bailey, (R 98-100) and he testified at length about the various items taken, identifying each by number, without a single objection by the defense (R 101-106). It was only after defense counsel elicited on cross-examination of Detective Bailey that he had no search warrant for Petitioner's house that the defense orally moved to suppress the evidence (R 109). A written motion to suppress was never filed until 2:25 o'clock on the second day of the trial and after the State had rested its case (R 160-161).

These facts clearly support the Trial Judge's decision. The transcript shows that the written Motion to Suppress Evidence was made after the State rested its case (R 160) and after the evidence objected to was introduced into evidence during the State's presentation of its case (R 117, 146, 147). The defense counsel stated he was unaware of a search without a warrant early in the second day of the trial but did not present any evidence or make any showing that he was not barred by laches from filing a Motion to Suppress at that late time (R 101, 111-116). Moreover, the defense counsel did not file a written Motion immediately after the noon meal hour recess (R 129) and did not file the written motion until after the State had rested its case at 2:25 P.M. in the afternoon (R 161).

In numerous Federal decisions, this Court has refused to grant certiorari in similar factual situations.

In *Garcia v. U.S.*, 315 F.2nd 133 (1) cert. denied 375 U.S. 855, 11 L.Ed. 2nd 82, 84 S.Ct. 117 (1963), the defendant did not move for suppression of evidence until nine months later during the course of the trial and after he had permitted the introduction of oral evidence upon the substance seized. The Fifth Circuit held that the right to suppression was waived in an absence of some showing of a reason for the delay. A similar factual case and verdict was rendered in *Rosen v. U.S.*, 293 F.2nd 938 (3) 5th Circuit (1961). As in those cases, there was no showing of any reason for the delay in the present case.

In *U.S. v. Shavin,* 320 F.2nd 308 7th Circuit (1963) cert. denied 375 U.S. 944, 11 L.Ed. 2nd 273, 84 S.Ct. 349, the Court upheld the trial court's decision deny-

ing a motion to suppress made after the trial proceeded into the fourth witness. In a similar 1968 Fifth Circuit case where the defense had an opportunity to know the facts prior to trial, the Court affirmed the trial court's decision. *Small v. U.S.,* 396 F.2nd 764 (3) In *Small,* the Court pointed out that the delay was part of counsel's trial stratagem and that counsel invited error when he did not object to several references to the exhibit. These circumstances apply to the present case where testimony was elicited from several witnesses without objection and again on cross-examination. (Respondent's Statement of Facts, supra)

As the previous cases citing U.S. Supreme Court and other Circuits of the U.S. Circuit Court of Appeals decisions indicate, there isn't any dispute between the Circuits upon this point. *U.S. v. Di Donato,* 301 F.2nd 383, cert. denied 370 U.S. 917, 82 S.Ct. 1557, 8 L.Ed. 2nd 497; *Belcher v. U.S.,* 50 F.2nd 573 8th Circuit (1931); *U.S. v. Romero,* 249 F.2nd 371 (1957).

B. IN GEORGIA THE DEFENDANT *ALWAYS* HAS THE OPPORTUNITY TO DETERMINE WHETHER A SEARCH WARRANT WAS ISSUED WITH PROBABLE CAUSE *PRIOR* TO TRIAL

The Federal Rules of Criminal Procedure 41 (8) expressly provides that the motion shall be made before trial or hearing unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion. However, the Georgia Legislature provided a means for a defendant to determine if a search warrant was issued by expressly requiring that a public record be made of all search warrants and their returns. Ga.

Code Ann. §27-304, 310. Moreover, the Search and Seizure Law adopted in Georgia required that the officer deliver a copy of the return to the person from whom the property was seized, upon request. Ga. Code Ann. §27-310.

Therefore under the Georgia Law of Search and Seizure, the defendant always has the opportunity to ascertain whether a search warrant was issued and probable cause set forth as a basis for the search warrant and what items were returned by the search prior to trial.

Hence, the Georgia Statute goes further than the comparable Federal Statute to provide ample opportunity for the defendant to ascertain whether a search warrant was issued and whether the search warrant was valid prior to trial. Even the Federal cases do not allow the late filing of a Motion to Suppress, if the defendant clearly had the opportunity to know whether a search warrant had been issued or not prior to trial. *Jones v. U.S.*, 362 U.S. 257 (1960)

This means that either the Petitioner, who had been free on bond for five months (indicted for Murder August 4, 1967 and granted bail the same day—R 7-8) or his attorney could have ascertained by simply examining the Search Warrant Docket of the trial court and the court file on this case that no search warrant had been issued and no inventory of property seized had been filed. Or they could have inquired of the District Attorney or of the officers themselves whether a search warrant had been issued. There is absolutely no showing whatever that Petitioner or his counsel ever made inquiry of any official connected with the prosecution about the circumstances of the search, or that they were either re-

fused information or misled by any such official. Thus there is a clear showing of laches on the part of Petitioner.

C. THE SEARCH WITHOUT A SEARCH WARRANT WAS NOT ILLEGAL AND UNREASONABLE UNDER THE EXIGENCIES OF THE SITUATION

The facts in the present case show emergency circumstances that required Atlanta Police Officers to search the Petitioner's home without a search warrant. Under those unusual circumstances, the reasonableness of the search is without question.

Under the facts of the present case, the police had sufficient reasons to suspect a violent crime or crimes had been committed within the curtilage of the house. The details of one killing and the details of the bloody bedroom had been related to police officers (R 136). A woman has been slain in the house where she lives, the police have been called to that home to investigate, the husband is under arrest for her homicide at the hospital, the house has been left unprotected, unlocked and with the front door open, and an officer has been requested by the 19 year old college student son who also lives in that house to return to the house to shield his brothers and his sister from the horror of a blood-drenched bedroom. The officers were aware only what had been told to them and did not know whether some other person within the house had placed the original call for police to come to the house, and if so, whether that person had been injured or killed (R 107). Moreover, the officers knew other persons had been summoned to the house where the instrumentality of the killing, presumably a

glass fruit jar, and blood covered the bedroom floor (R 158, 136). In fact, Petitioner's brother arrived while the police were at the house (R 103, 106).

This was an emergency situation in every aspect. This house was the scene of a crime of violence as distinguished from the usual search for contraband or fruits of a crime after its commission. In this connection, the United States Supreme Court said in the recent landmark decision of *Warden v. Hayden,* 387 U.S. 294 (1967), where a search of the basement and house of the defendant was upheld although not incident to an arrest, without a search warrant and without consent of the defendant:

> "We agree with the Court of Appeals that neither the entry without warrant to search for the robber nor the search for him without warrant was invalid. Under the circumstances of this case, 'the exigencies of the situation made that course imperative.' *McDonald v. United States,* 335 U.S. 451, 456." (Emphasis added)

The Supreme Court added that "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." In this case, the U.S. Supreme Court held for the first time searches may be made for "mere evidence" of the commission of a crime.

We respectfully submit that the exigencies of the situation in this case required the officers to proceed immediately to the home of Petitioner, as they had been requested to do by his son, to determine the circumstances existing there. In addition, the burden of obtaining a search warrant was more than likely to frustrate

the government purpose behind the search. *U.S. v. Rabinowitz,* 330 U.S. 56, 65; *Schmerber v. California,* 384 U.S. 757, 853. In *Spiro v. McKendrick,* 2 Criminal Law Reporter 2023 (1967), New York District Court, the court citing *Rabinowitz, supra,* and *Cooper v. California,* 386 U.S. 58, 62, stated:

> "Spiro argues further, that, 'however the events are analyzed, there was ample time and opportunity for the police to have obtained a search warrant for the later search.' This is not a persuasive argument here. 'The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.' "

This case is analogous to *Warden v. Hayden,* 387 U.S. 294 (1967) in that the exigencies of the situation made the search imperative. Unlike, *James v. State of Louisiana,* 382 U.S. 37 cited by the Appellant involving the search of the house for narcotics in which there were no emergency circumstances, the present case clearly show exigencies that required the officers to act promptly.

In effect, the Petitioner argues that if an assailant manages to remove his victim far away enough from his house before police arrive the police would not have a right to search the home under any circumstances without a search warrant, citing *James v. Louisiana, supra.* Such is not the law as the relevant factor is the reasonableness of the search. *Cotton v. United States,* 371 F.2nd 385, 392. In the recent case of *Sibron v. New York,* 392 U.S. 40, decided June 10, 1968, this Court stated:

> "The question in this court upon review of a state-approved search or seizure is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment."

In *Steven v. State,* 443 P.2d 600, decided July 23, 1968, the Alaska Supreme Court upheld a warrantless search of a frontier home after the discovery of the homicide under the "exigency rule". The police entered the home without a warrant upon receiving an emergency call, were told of the homicide, and then inspected the premises. The Court held that after legal entry, with knowledge that a homicide had been committed, it became duty of police officer to investigate the circumstances and that this duty carried with it the right to inspect the premises.

In *Davis v. State,* 236 Md. 389, 204 A.2d 76, cert. denied, *Davis v. Maryland,* 380 U.S. 966, 85 S.Ct. 1113, 14 L.Ed. 2d 156 (1965), the Maryland Supreme Court upheld the warrantless entry of the house. The police were called to investigate a body found in a yard, saw two feet at a window of the house but were unable to see more, saw blood stains on the porch, knocked without response, and entered the house to determine if the owner of the pair of feet was injured or dead. Similarly, Officers in the present case proceeded to the Thomas residence within minutes of receiving the emergency call because they didn't know whether someone else was injured at the home, who had called, or whether the call had been placed from the home and felt they had authority to enter the house because of the original police call to go to the house and because of the open front door and the fact that no one had responded at the house to Officer Anglin's calls (R 108).

As aptly pointed out in *Wayne v. U.S.,* 318 F.2d 205, 212, cert. denied 375 U.S. 860, 84 S.Ct. 125, 11 L.Ed.2d 86 (1963), "the business of policemen and firemen is to act, not to speculate or meditate on whether the report

is correct. People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process. . . . A myriad of circumstances could fall within the terms exigent circumstances referred to in *Miller v. U.S.*, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed. 2d 1332 (1958)." See also, *U.S. v. Barone,* 330 F.2nd 543 2d Circuit, cert. denied 377 U.S. 1004, 84 S.Ct. 1940, 12 L.Ed. 2d 1053 (1964); *Patrick v. State,* 227 A.2d 486, 489 (Del. 1967); *Davis v. State, supra.* As pointed out by Justice Butler in *Go-Bart Importing Co. v. U.S.,* 282 U.S. 344, 357 (1931), "there is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." *U.S. v. Rabinowitz,* 339 U.S. 56, 63 (1950); *Rios v. U.S.* 364 U.S. 253, 255 (1960); *Ker v. California,* 374 U.S. 23 at 33, 83 S.Ct. 1623, 10 L.Ed.2d 726 at 744.

Moreover, Officers have a duty to safeguard the property of citizens, even suspects, which is abandoned or unprotected. See *Cotton v. United States,* 9 Cir. 1967, 371 F2 385, where the Ninth Circuit Court of Appeals said in part, at page 392:

> "Cotton having been validly arrested and taken to the police station, the officer would have been derelict in his duty if he had left the car unattended in a dark alley in the middle of the night. The police have as much a duty to protect the property of a suspect as they have to protect the property of the rest of us, and that is what they did in this case by towing the car to the police impound. They also had a duty to keep a record of the property that they had impounded so that it could be returned to the suspect or to its owner in due course. For reasons stated below, we do not think that the mere opening of the door of the car for the purpose of making such a record was, under the circum-

> stances, a search, but if it was, the circumstances under which it was done make that search an entirely reasonable one. . . . The Constitution prohibits only unreasonable searches and seizures." (Emphasis added)

Certainly, by analogy, the Atlanta Police Officers had a clear duty to enter the Petitioner's home to secure it against instrusion by others and to determine the circumstances existing within that home, to which they had been initially summoned only minutes earlier and where violent death had struck.

CONCLUSION

In summary, we respectfully insist that this Petition is completely without merit for two reasons, (1) the Petitioner completely waived any right to complain about the search and seizure through his failure to file a timely written motion to suppress until the State rested and (2) in any event, the search and seizure of evidence in his home was completely lawful and reasonable under the peculiar circumstances and exigencies of this case.

For the foregoing reasons, Respondent urges that this Court deny the Petition For Certiorari in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Post Office, Atlanta, Georgia, three copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari with first class postage prepaid, addressed to Mr. Frank B. Hester, Hester & Hester, 803 Fulton Federal Bldg., Atlanta, Georgia 30303, counsel of record for Petitioner.

This.....day of....., 1969.

J. ROBERT SPARKS
Of Counsel for Respondent